

(2)
No. 87-1610

SUPREME COURT, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

JACK DYKSTRA FORD, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

BRIEF OF THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals abused its discretion when it denied permission for an interlocutory appeal pursuant to 28 U.S.C. (Supp. III) 1292(b).



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OPINIONS BELOW

The court of appeals' order denying petitioner's request for permission to appeal under 28 U.S.C. (Supp. III) 1292(b) (Pet. App. 1a-3a) is not reported. The district court's opinion denying petitioner's motion to dismiss or for summary judgment (Pet. App. 5a-11a) is also not reported.

JURISDICTION

The order of the court of appeals was entered on December 28, 1987. The petition for a writ of certiorari was filed on March 25, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an automobile dealer. In December 1976, Carol King applied to petitioner for a job as a sales

person. Petitioner did not hire King and on February 2, 1977, King filed with the Michigan Department of Civil Rights (MDCR) a complaint alleging sex discrimination. On February 15, 1977, King's complaint was also submitted to the Equal Employment Opportunity Commission (EEOC) as a charge of employment discrimination under Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*). Pet. App. 5a-6a.

Following an investigation, MDCR found cause to charge petitioner with illegal discrimination under Michigan law, and the matter proceeded to a hearing before a referee in 1980. At the hearing, petitioner sought the testimony of the MDCR official who conducted an effort at conciliation. MDCR claimed that such testimony was privileged and thus refused to allow the official to testify. As a discovery sanction, the referee dismissed the case without prejudice on March 18, 1981; the dismissal was affirmed by a Michigan trial court and the Michigan Court of Appeals. Pet. App. 6a.

On July 12, 1983, MDCR filed a new charge against petitioner. In May 1985, however, MDCR and petitioner stipulated to dismissal of the charge with prejudice because King had not filed a new complaint after the dismissal of the first charge. A Michigan trial court entered the dismissal order pursuant to the stipulation. Pet. App. 6a-7a.

2. After the state proceedings ended, the EEOC began processing King's charge and found reasonable cause to believe that petitioner engaged in sex and race discrimination. Thus the EEOC instituted this action against petitioner under Title VII. On February 2, 1987, petitioner moved to dismiss the action on the ground that the EEOC's claim is barred by the state court order dismissing MDCR's case with prejudice. Pet. App. 7a-8a. The district

court denied petitioner's motion. The court stated that "[s]ince the EEOC and King did not have their claims under 42 U.S.C. § 2000e decided on the merits, res judicata does not bar the present claim" (*id.* at 9a). On reconsideration, the district court amended its opinion to certify its order for immediate appeal pursuant to 28 U.S.C. (Supp. III) 1292(b) (Pet. App. 4a).

Petitioner then filed, pursuant to Fed. R. App. P. 5, a petition for permission to appeal from the district court's interlocutory order. The court of appeals, however, denied permission for an immediate appeal. The court declared: "Upon consideration of the petition and response, the Court concludes that interlocutory review under 28 U.S.C. § 1292(b) is not appropriate" (Pet. App. 3a).

ARGUMENT

The Court has authority to review "[c]ases in the courts of appeals" (28 U.S.C. 1254). Accordingly, the Court has no authority to review matters that were not within the jurisdiction of the court of appeals. See *Nixon v. Fitzgerald*, 457 U.S. 731, 741-743 (1982). Here, the only matter properly "in the court[] of appeals" was whether that court would permit an interlocutory appeal under 28 U.S.C. (Supp. III) 1292(b). Thus, the issue presented by petitioner—whether the EEOC's action is barred by 28 U.S.C. 1738 and Michigan's doctrine of res judicata—is not properly before this Court.

Section 1292(b) states that the court of appeals "may * * * in its discretion, permit" an appeal of an order certified for immediate appeal by the district court. The Senate committee report accompanying this provision makes it clear that the appellate court "may refuse to entertain such an appeal in much the same manner that the

Supreme Court today refuses to entertain applications for writs of certiorari." S. Rep. 2434, 85th Cong., 2d Sess. 3 (1958). It further states (*ibid.* (emphasis added)) that

the court of appeals may deny such an application without specifying the grounds upon which such a denial is based. * * * It could be denied on the basis that the docket of the circuit court of appeals was such that the appeal could not be entertained for too long a period of time. But, *whatever the reason, the ultimate determination concerning the right of appeal is within the discretion of the judges of the appropriate circuit court of appeals.*

Accord *Tidewater Oil Co. v. United States*, 409 U.S. 151, 173 n.50 (1972).

In this case, the court of appeals did not abuse its discretion in denying petitioner's request for an immediate appeal. Indeed, petitioner contends that the district court's decision is "clearly erroneous" (Pet. 6); but petitioner never asserts, let alone demonstrates, that the court of appeals' decision not to permit an appeal was an abuse of discretion.* Thus, the only order currently subject to this Court's review is not even challenged.

* In fact, the district court's decision is not "clearly erroneous." Under 28 U.S.C. 1738, a federal court must give the same preclusive effect to a state court judgment as would be accorded in the court which entered the judgment. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 462-463 (1982). But petitioner cites no Michigan authority for the proposition that the EEOC is barred from bringing this action by the dismissal of MDCR's prior action, in which the EEOC was not a party and which did not involve a Title VII claim. Further, unlike the situation in *Kremer*, where this Court found pursuit of a Title VII claim precluded by a state court judgment that the plaintiff had not been the victim of discrimination, in this case the state court dismissal looked not to the merits but was imposed as a discovery sanction.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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